IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PETERSON FARMS' RESPONSE TO THE STATE'S OBJECTION TO ORDER GRANTING MOTION TO COMPEL DISCOVERY OF PETERSON FARMS [DKT #1463] AND ORDER DENYING RECONSIDERATION THEREOF [DKT #1629](DKT #1659)

Defendant, Peterson Farms, Inc. ("Peterson") submits its response to the State's Objection to Order Granting Motion to Compel Discovery of Peterson Farms [Dkt. #1463] and Order Denying Reconsideration Thereof [Dkt. #1659] (Dkt. #1659) (hereinafter "State's Objection"), and respectfully requests that the State's Objection be denied. In support of its Response, Peterson states the following:

I. Introduction

The State's Objection arises from Magistrate Judge Joyner's grant of Peterson Farms' Motion to Compel Regarding the State's Agency Privilege Logs [Dkt #1463], and subsequent denial of the State's Motion for Reconsideration of that same Order. Peterson's Motion to Compel sought the production of many documents from the State's agencies' privilege logs wherein the State blatantly and definitively refused to provide information sufficient for the Defendants to evaluate the State's agencies' claims of privilege and work product. More specifically, Peterson's Motion to Compel sought the production of 253 documents that the State claims are subject to attorney-client privilege and the production of 99 documents that the State claims are subject to work product protection.[1] Notably, to the extent it can be discerned, each of the privilege log entries contested by Peterson is related to actions taken by the State agencies outside of this litigation. This important detail has been conveniently misconstrued by the State and is critical to the Court's evaluation of the State's Objection.

Contrary to the State's representations, Magistrate Judge Joyner [hereinafter "Magistrate Joyner"] did not commit any error in his January 16, 2008 Order. The State's Objection apparently stems from its dissatisfaction with the result of the Order rather than any actionable error committed by Magistrate Joyner. In his Order, Magistrate Joyner appropriately found that:

1. Oklahoma privilege law applied to the State's claims of attorney-client privilege; and
2. Peterson had established the requisite need for all of the **contested** work product documents.

As a result of those findings, Magistrate Joyner ordered:

1. The State to revise its privilege logs to clearly state for each of the contested documents it claims are protected by the attorney-client privilege whether the document is part of a pending investigation, litigation or proceeding;

[1] In most instances these are the same documents. The State has asserted both attorney-client privilege and attorney work product to most of its documents on the revised agency privilege logs.

2. The State in those instances where the document is a part of a pending investigation, litigation or proceeding must identify how disclosure of the information would impair the ability of the public officer or agency to process the claim or conduct the pending investigation, litigation or proceeding in the public interest;
3. The State to produce any contested document under the State's attorney-client privilege claim where the State could not demonstrate that it was created as a part of a pending investigation, litigation or proceeding within the five year temporal limit;[2] and
4. The production of all the contested documents that the State claims were protected by the work product doctrine.

Each of these findings was supported by Magistrate Joyner's review of the "arguments and authorities of the parties."

II. Standard of Review

With respect to a magistrate judge's order relating to non-dispositive pretrial matters, the district court does not conduct a de novo review; rather, the court applies a more deferential standard by which the moving party must show that the magistrate judge's order is "clearly erroneous or contrary to law." *Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir.1997); *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1462 (10th Cir.1988). The clearly erroneous standard "requires that the reviewing court affirm unless it on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ocelot Oil*, 847 F.2d at 1464 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

Thus, if the District Court after reviewing the briefs and exhibits attached to the briefs filed on the Motion to Compel and subsequent Motion for Reconsideration does not have a firm and definite conviction that Magistrate Joyner's Orders were clearly erroneous or contrary to law, it must affirm them. In this matter, sufficient evidence and argument was submitted to

[2] The Magistrate placed a five year temporal limit on the State's production temporarily until he rules upon the State's Motion to Expand the Discovery Period [Dkt. #1418] wherein the State alleges it is entitled to corporate documents from each Defendant beyond five years prior to the filing of the lawsuit. This is issue is currently pending before the Court.

Magistrate Joyner on Peterson's Motion to Compel. Moreover, Magistrate Joyner conducted a complete and thorough evaluation of the applicable law on this matter as submitted by the parties and issued Orders which appropriately applied the relevant law to the facts in this matter.

III. Argument

A. Magistrate Joyner Correctly Found Oklahoma Law Applied to the State's Claims of Attorney-Client Privilege.

Oklahoma's law on attorney-client privilege favoring disclosure of governmental documents rather than general federal common law was appropriately applied by Magistrate Joyner in his January 16, 2008 Order. The State asserts that Magistrate Joyner erred by applying Oklahoma privilege law to the State's claims of attorney-client privilege rather than federal law. The State 's arguments are three-fold: (1) because this case is a federal question case with pendent state law claims it was completely inappropriate for Magistrate Joyner to even consider much less apply Oklahoma law; (2) that Magistrate Joyner's analytical solution in determining whether to apply federal or state law claims of privilege was in error; and (3) that the result of the application of state privilege law to the State's claims of privilege will result in the stripping of valid privilege claims, which the State alleges should remain permanently. In each instance, the State not only misconstrues Magistrate Joyner's Order, but exaggerates the potential effects of the Order upon the State. Each of these arguments is wholly without a logical, legal or evidentiary basis.

1. Magistrate Joyner appropriately found that the Tenth Circuit requires an analytical solution when state and federal law of privilege conflict.

As recognized by Magistrate Joyner in his March 14, 2008 Order, the State seeks to have the Court enforce general privilege law rather than the specific Oklahoma statutes which govern its conduct. [Order, Dkt. #1629, pg. 2). Contrary to the State's assertions, the Court's

application of Oklahoma law was based upon a well reasoned analytical approach. The Court appropriately began its analysis with *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1356 (10th Cir. 1997). In his January 16, 2008 Order, Magistrate Joyner correctly found that the Tenth Circuit's holding in *Sprague* requires the court to consider both federal and state laws of privilege when both federal and state law claims are present. He further found that Fed. R. Evid. 501 and *White v. American Airlines*, 915 F.2d 1414 (10th Cir. 1990) require the application of state law privilege to state law claims. The Tenth Circuit in *Sprague* held that when a privilege is upheld under one body of law and not the other, "then an analytical solution must be worked out to accommodate the conflicting policies embodied in the state and federal privilege law." *Sprague*, 129 F.3d at 1368; *see also* Order, Dkt. #1463, pg. 2]. After reviewing the details of the State's claims in this action, Magistrate Joyner concluded that Oklahoma's privilege law should apply.[3]

The State asserts that Fed. R. Evid. 501 clearly states that only in diversity cases should the court consider state law. This argument purposefully misstates Fed. R. Evid. 501, which states that "with respect to an element of a claim or defense to which State law supplies the rule of decision, the privilege of a …government, State or political subdivision thereof shall be determined in accordance with State law." The State also attempts to minimize the directive from the 10th Circuit in *Sprague* by categorizing it as "*dicta*." The 10th Circuit's recognition that an "analytical solution" is necessary to resolve conflicts in federal and state law clearly presumes that there is not a one size fits all solution to this dilemma. Thus, the State's argument that courts have uniformly applied federal privilege law in cases involving pending state claims is not only self-serving, but short-sighted.

[3] Coincidently, one of the State's arguments is that once privilege applies it is permanent. It is not contested that privilege must apply at the time the document's creation. However, as to each of the documents contested by Peterson assuming the privilege would apply at the time of its creation, the law that would apply to each of these documents at the time of its creation would be Oklahoma law. The State is asking this Court to determine that even though at the time of the creation of the document Oklahoma law applied it should now remove that privilege and put in its place federal privilege law. This argument is simply nonsensical.

Consequently, none of the cases cited by the State are analogous to the facts, circumstances and claims within this case. None of the cases involve a State pursuing both federal and state law claims against private entities. The State argues that in *Perrigon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D. Cal. 1978) that the court applied federal law under similar circumstances to those here. The court in *Perrigon* did apply federal law to a case that involved "primarily a federal question case." *Id*. at 458-59. However, this case is distinguishable even though the State has attempted to categorize this case as primarily federal question case. This point was recognized by Magistrate Joyner. (Order, Dkt. 1463, pg 2). Magistrate Joyner found that although this case does involve federal questions, the "state law claims are of equal importance to the federal claims raised." (Order, Dkt. #1463, pg. 2). The State argues that Magistrate Joyner's consideration of the state claims raised by it against the Defendants in his analysis was inappropriate. However, the State contradicts its own arguments in fn. 2 of the State's Objection, wherein it makes Magistrate Joyner's point that the federal claims asserted by the State are not distinctly different.

As pointed out by Peterson in its Reply Brief to the State's Response to Peterson's Motion to Compel, the State has asserted jurisdiction under diversity of citizenship as well as federal question jurisdiction. The State's state law claims include both statutory law and common law claims for nuisance, trespass and unjust enrichment, which the State has contended if successful, would provide it remedies which are unavailable under its "alternative" federal claims. (Peterson Reply, Dkt. # 1359. pg. 3). Moreover, as to the other cases cited by the State, in each instance when the state law and federal law of privilege conflicted, the court favored the law which permitted disclosure. *See Pearson v. Miller*, 211 F.3d 57, 66 (3rd Cir. 2000); *W.M.T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3rd Cir. 1982). The remainder of

the cases cited by the State in support of its proposition that federal law has been uniformly applied in cases where both federal and state law claims exists should not be considered by this Court as they were never presented to Magistrate Joyner by the State in either its briefing on the underlying Motion to Compel or in its Motion for Reconsideration.[4]

2. Magistrate Joyner did not commit error when he considered the public policy encompassed within the Oklahoma Open Records Act and Oklahoma privilege statutes.

The public's interest in full disclosure by the State is a vital consideration in the court's analytical analysis of the application of state versus federal privilege law. The State also argues that Magistrate Joyner was inappropriately swayed by the "public policy" it found in the Oklahoma's Open Records Act ["ORA"]. According to the State, public policy is irrelevant to the court's analytical analysis under *Sprague*. To the contrary, the purpose of the analytical analysis mandated by the 10th Circuit is to take into consideration the policies behind both the federal and state law which are in conflict. There would be no need to conduct this analysis if the state and the federal laws were the same.

Magistrate Joyner correctly began his analysis by reasoning that the State should be governed by its own public policy, which requires disclosure to the public with very limited exception. To allow the State to hide behind federal privilege law and circumvent Oklahoma laws which govern its activities would wholly disregard the Oklahoma Legislature's clear statement of the public's interest in open access to its agencies' records. Magistrate Joyner

[4] Nevertheless, the cases cited by the State can be easily distinguished. First, in *Atteberry v. Longmont United Hospital*, 221 F.R.D. 644, 647 (D. Colo. 2004), the District Court indicated that although in that case there there was no apparent reason to apply state law of privilege it is important for courts to ascertain the interests of the state's doctrines when applying the principal of comity. Moreover, the District Court in *Atteberry* reasoned that Rule 501 "manifests a congressional desire not to freeze the law of privilege, but rather to provide the courts with flexibility to develop rules of privileges on a case-by-case basis." *Id.* at 647-648. Second, all of the other cases cited in fn. 1 of the State's Objection with the exception of *Atteberry* involve rulings from other circuits, and all but *Atteberry* are prior to the 10th Circuit's holding in *Sprague v. Thorn Americas*, 129 F.3d 1356 (10th Cir. 1997). Thus, *Sprague* remains the controlling law in this circuit. Furthermore, none involved a state as a party who is subject to a open records act under that particular state's laws.

recognized that the public policies contained within the ORA served as the catalyst for the exception to Oklahoma's attorney-client privilege law for documents created by Oklahoma agencies. Okla. Stat. tit. 12, § 2502 (D)(7).

In continuing his analytical analysis, Magistrate Joyner looked at Oklahoma's law on attorney-client privilege, which in part mirrors federal privilege law. However, an exception to absolute protection exists regarding certain governmental documents. Okla. Stat. tit. 12, § 2502 (D)(7). Section 2502 (D)(7) creates a specific exception for communications between a public officer or agency and its attorney. According to this exception, attorney-client privilege exists for communications between a public officer or agency and its attorney when the communication concerns a pending investigation, claim or action and the court determines that disclosure of that communication will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest. Thus, contrary to the State's assertion, the general rule of absolute attorney-client privilege does not exist for the State's documents.

3. Magistrate Joyner did not err in requiring the State to supplement its agency privilege logs.

Magistrate Joyner in applying Oklahoma law to the State's privilege logs found that the information provided by the State on those logs was insufficient for either it or Peterson to determine whether those communications were protected pursuant to Okla. Stat. tit. 12, § 2502 (D)(7). Although Peterson asserts the State's failure to meet its burden of establishing the existence of its claims required the immediate production of the contested documents, Magistrate Joyner graciously permitted the State to revise their logs to indicate whether the communication was created as a part of a pending investigation, claim or action. The only physical document production required by the Orders as to the contested attorney-client privilege documents was for

those documents which are no longer a part of a pending investigation, claim or action. Consequently, it is evident that the State's arguments regarding Magistrate Joyner's failure to employ a proper analytical analysis are completely without merit.

Interestingly, the State's plan to avoid production at all costs of these highly relevant and probative documents is verified by two extremely illogical and ill-placed arguments. First, the State's claim that applying Oklahoma attorney-client privilege law will result in ongoing problems between the parties. This argument is flawed. A simple review of Petersons' summary of the contested attorney-client privilege entries on the State's logs reveals that none of the contested claims involve this lawsuit. Second, the State claims that Magistrate Joyner's application of Oklahoma privilege law in this case will result in a chill of communications between the State agencies and their counsel. Peterson is not seeking to obtain information within this lawsuit for which it has no legal basis for obtaining. Upholding Magistrate Joyners' Orders will not compel the production of any document that is no currently open to public view under ORA. Moreover, it is safe to assume that when the Oklahoma Legislature enacted the ORA and Okla. Stat. tit. 12, §2502 (D)(7), it weighed the public's interest in open access to the State's records versus any potential chilling effect it may have upon communications between state attorneys and state representatives.

In sum, none of the arguments or authorities cited by the State support its assertion that Magistrate Joyner's findings of fact or conclusions of law were erroneous. What is clear from the State's arguments is that it wants the Court to ignore the state's own public policy interest in keeping the files of the State open to the public. It is evident that the only analytical approach the State would support would be one that concluded that the contested documents improperly withheld under attorney-client privilege need not be produced. However, such an analytical

approach would permit the State to circumvent its own governing laws. Ultimately, the ruling sought by the State would result in the absurd – a private citizen could file a simple ORA request and obtain the very same documents being withheld from Peterson in this federal litigation.[5]

4. No Basis for *In Camera* Review Exists.

Magistrate Joyner properly ordered the State to revise its privilege logs to add the necessary information pursuant to Okla. Stat. tit. 12, § 2502(D)(7). However, not unlike its argument within it Motion for Reconsideration, the State argues that if it is forced to revise the privilege logs as mandated by Magistrate Joyner's Order, such disclosure will result in a waiver of the privileges asserted. The State asserts that by simply providing this information it could reveal something privileged, or alternatively, the information will be insufficient to allow Peterson to assess the claim. These assertions are not supported by any authorities or evidence. This self-created dilemma seeks to have this Court conduct an *in camera* review of the privilege logs prior to the submission of the revised privilege logs to the Defendants and prior to any alleged claim by the Defendants that the information on those logs is insufficient to evaluate or support the State's claims of privilege. An *in camera* review at this point in time is not only inappropriate, but premature.

According to the State, Okla. Stat. tit. 12, § 2502(D)(7) does not require that the necessary showing be made in an open, adversary proceeding. As recognized by Magistrate Joyner in his Order denying the State's Motion for Reconsideration, the Oklahoma Legislature very carefully stated that "communications are not protected unless they concern a pending investigation, claim or action and the court determines that disclosure will impair the ability of

[5] Notably, Peterson submitted ORA requests to each of these agencies in July 2005. With the exception of two agencies, the Oklahoma Department of Agriculture, Food and Forestry and the Oklahoma Department of Mines, the State refused to answer those requests. Ultimately, Peterson issued discovery within this matter to obtain the same information.

the public officer to conduct the investigation." [Order, Dkt. #1629, pg. 3]. Magistrate Joyner found that there was no suggestion that the court is to make this determination *in camera*.

Rather than allow the parties to participate in the discovery process as it is dictated by the federal rules, the procedure suggested by the State not only denies Peterson its right to participate in the selection of those entries it chooses to contest, but it places an unnecessary burden upon the Court to examine each and every entry of the privilege log regardless of whether it is subject to dispute. Ultimately, the State has failed to show the underlying premise of its argument that disclosure of the information required by Magistrate Joyner's Order will result in a waiver of privilege. The State has also failed to show how an *in camera* review is mandated under Oklahoma law. Finally, the State has failed to show Magistrate Joyner's failure to grant such request is a clear error of law.

B. Magistrate Joyner Properly Ordered the State to Produce All Contested Work Product.

In his January 18, 2008, Magistrate Joyner correctly found that Peterson had provided sufficient evidence to establish the requisite need and undue hardship pursuant to Fed. R. Civ. P. 26(b)(3) and (4)(B). In support of its Objection, the State claims that Magistrate Joyner's Order requiring the production of all contested work product were unsupported by the evidence. The State argues that Peterson failed to establish "special need" and unavailability from other sources. In furtherance of its argument, the State again exaggerates the breadth of Magistrate Joyner's Orders and the consequences resulting therewith. Peterson has only sought the production of certain documents identified on the State's privilege logs.

The State incorrectly contends that Magistrate Joyner erred because Peterson did not made a sufficient showing of need as required under Fed. R. Civ. P. 26(b)(3) and (4)(B). The State would have this Court completely disregard the arguments contained within Peterson's

Motion to Compel, Reply in support thereof, and in oral arguments before the Magistrate on December 6, 2007. Peterson submitted sufficient evidence to Magistrate Joyner to demonstrate that it had a "substantial need" and/or "exceptional circumstances" existed as well as the "undue hardship" necessary to obtain the contested work product documents on the State agencies' privilege logs. Those entries as previously identified by Peterson deal specifically with the State's actions regarding Sequoyah Fuels, Jock Worley's unlawful mining activities, the Arkansas-Oklahoma Compact Commission, water-quality violations by the City of Watts, proposed sewage project for West Siloam Springs, Lake Francis' contributions to water quality and an illegal dam on Barron Fork. Each of these activities occurred within the Illinois River Watershed as defined by the State and is a potential contributor to the harm the State alleges. Moreover, none of these documents were created as a part of this litigation.

While continuing to deny the State's allegations against it, Peterson in its Answer to the Second Amended Complaint alleged that the State is a potentially responsible party and has engaged in activities which have contributed to the alleged damage to the IRW. (See Dkt. #1236, Peterson Farms' Answer to Second. Am. Complt., ¶¶ 76, 88, 116, 124 and Affirmative Defenses ¶¶ 39, 46 and 50). As previously argued by Peterson, each of these documents deals specifically with how the State has managed potential and actual environmental conditions within the IRW. What the agency personnel observed and how they managed the condition are absolutely vital to Peterson's defense in this matter. Magistrate Joyner evidently agreed.

Peterson also argued that certain documents that were contested were apparently created by alleged non-testifying experts. In order to obtain those facts known to an expert who has not been identified as a testifying expert, a party may demonstrate "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions by other

means." Fed. R. Civ. P. 26 (b)(4)(B). "Exceptional circumstances may be shown when (1) the condition observed by the expert is no longer observable…." *Hollinger Int'l Inc. v. Hollinger, Inc.*, 230 F.R.D. 508, 522 (N.D. Ill. 2005)(citing *Ludwig v. Pilkingtson N. Am. Inc.*, 2003 WL 22242224, at *3 (N.D. Ill. September 29, 2003).

Peterson argued that each of the documents identified by the State involved facts regarding observed physical conditions, which could not likely be replicated today because they involved environmental conditions existing in 1998, 1999, 2003, 2004 and 2006. Magistrate Joyner logically concluded that because this case involves an ever-evolving environment and that it was unlikely that Peterson would be able to replicate the conditions identified in these contested documents today, Peterson had established the requisite need for these documents. Contrary to the State's assertion, Magistrate Joyner's conclusion in its January 16, 2008 Order that Peterson has shown "special need" under Fed. R. Civ. P. 26(b)(3) and (4)(B) was in fact based upon sound logic and evidence.

The contested work-product documents specifically deal with the State's administrative obligations. Each of these documents is likely to contain what the State knew about a situation or condition within the Illinois River Watershed, and how the State managed that situation or condition. Therefore, it is impractical, if not impossible, for the Defendants to obtain those opinions or facts from another source.

Even though the State attempts to convince the Court that Peterson has not shown the undue hardship necessary to obtain this information by alluding to the million pages of documents and Jock Worley's mining file from the Dept. of Mines, these arguments fall short of being persuasive. The State has intimate knowledge of the contents of the contested documents, but it has failed to point Peterson to one document which contains the same facts as those

contained within those documents. Moreover, even if the entire Jock Worley mining file from the Dept. of Mines has been produced, the documents sought by Peterson are from the Oklahoma Dept. of Environmental Quality and other agencies whose jurisdictional responsibilities differ from those of the Dept. of Mines. Therefore, the documents contained with the Department of Mines files may vastly differ from those in other agencies' files.

Finally, the State also argues that this information could be obtained through interrogatories and depositions. One need not be clairvoyant to envision that the such interrogatories or depositions questions would be met with the same objections as those raised by the State here. These arguments by the State are simply a distraction to the real issues presented by Peterson regarding the State's documents; and as such should be disregarded. Magistrate Joyner correctly found that the evidence and argument submitted by Peterson was sufficient to establish the necessary need and burden under Fed. R. Civ. P. 26 (b)(3) and (4)(B).

III. Conclusion

In its Objection, the State claims that Magistrate Joyner erred by applying Oklahoma privilege law to its claims of attorney-client privilege and finding that Peterson has met its burden of showing the requisite need under Fed. R. Civ. P. 26 (b)(3) and (4)(B). However, rather than putting forth credible arguments in support of its Objection, the State over exaggerates the effects of Magistrate Joyner's Order and misstates his relevant findings. Peterson and other Defendants have asserted that the State has unique knowledge about sources of the alleged pollution in the Illinois River Watershed, and further that through its agencies t has contributed to the harm it alleges the Defendants have caused. The State is simply trying to avoid producing information from within its files which might support those claims. This Court

should not be persuaded by such tactics. Peterson Farms respectfully requests that the Court deny the State's Objection, and grant Peterson any relief it deems appropriate.

By /s Nicole M. Longwell

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CERTIFICATE OF SERVICE

I certify that on the 14th day of April 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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